

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

**BRANDON SMITHWICK,**

**Plaintiff,**

**v.**

**BNSF RAILWAY COMPANY,**

**Defendant.**

**No. CIV-18-160-G**

**ORDER**

Now before the Court is a Motion in Limine Regarding Testimony of Witness Not Disclosed Prior to the Deadline for Witnesses (Doc. No. 76) filed by Plaintiff Brandon Smithwick. Defendant BNSF Railway Company has responded (Doc. No. 114), and the Motion is now at issue.

Plaintiff moves to prohibit Defendant from “calling any witnesses not listed on [its] witness list.” Pl.’s Mot. at 1. Defendant answers that Plaintiff’s Motion fails to identify any potential unlisted witness and that Defendant would request “that this Court’s local rules and practice regarding the calling of any witnesses not listed on the Final Pretrial Report apply to both Plaintiff and Defendant equally.” Def.’s Resp. at 3.

Plaintiff’s request is not a proper basis for a motion in limine, as he does not seek “guidance by the court regarding an evidentiary question.” *Edens v. Netherlands Ins. Co.*, 834 F.3d 1116, 1130 (10th Cir. 2016) (internal quotation marks omitted). Neither party has sought authorization to call at trial any witnesses who have not been previously disclosed or notified the Court that such a witness is included in the parties’ proposed final pretrial report. And, to the extent Plaintiff seeks to exclude the testimony of properly

disclosed witnesses who were not deposed in this matter, he “offers no authority to support a contention that only witnesses who have been deposed may testify at trial. Whether to take the deposition of the opposing party’s properly disclosed witnesses is a decision to be made by [Plaintiff] and his attorney; there is no requirement that he depose any witness.” *Smith v. BNSF Ry. Co.*, No. CIV-08-1203-D, 2011 WL 13176827, at \*3 (W.D. Okla. Sept. 13, 2011).

### CONCLUSION

For the foregoing reasons, Plaintiff’s Motion in Limine Regarding Testimony of Witness Not Disclosed Prior to the Deadline for Witnesses (Doc. No. 76) is DENIED.

IT IS SO ORDERED this 17th day of May, 2021.

  
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CHARLES B. GOODWIN  
United States District Judge